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No. 85-1596

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

STEIN DISTRIBUTING COMPANY, INC.,
Appellant,

v.

DEPARTMENT OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO & FIREARMS,
Appellee.

On Appeal From the United States Court of Appeals for the Ninth Circuit

REPLY MEMORANDUM

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REPLY MEMORANDUM

In its Motion to Dismiss ("Motion"), the BATF does not seriously contend that the decision below can be reconciled with decisions of other federal courts of appeals. Rather, the primary thrust of the BATF's position in this Court—in sharp contrast to its position before this Court only six years ago when it characterized questions identical to those presented by this case as being "profound," Juris. Stat., at 14 & n.7—is that these questions "might" be "appropriate"

for this Court's review if the other federal courts of appeals "adhere" to their prior decisions which are in square conflict with the decision below.[1] Motion, at 8 n.5.

The BATF understandably makes no attempt to explain how such "profound" questions have become unworthy of this Court's review now that the Ninth Circuit has nullified the express will of the Idaho legislature—defended strongly in this Court by the Attorney General of Idaho—in a decision which also nullified a similar California statute and which would, if it were applicable, sweep away similar judgments of the legislatures of Massachusetts, Illinois, Wisconsin, Texas and Florida. Juris. Stat., at 20-21 & nn.13, 14.

If the BATF, through regulations not even authorized by Congress, is to attempt to dismantle, piece-by-piece, the comprehensive regulation of the intrastate distribution of alcoholic beverages by the States, appellant, the State of Idaho and the other affected States are surely entitled to regard the issues raised by this attempt as profound. This reversal of position by the BATF in this Court, born of a Ninth Circuit decision singularly devoid of any reasoned analysis of

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[1] The decision below is not only squarely in conflict with two decisions of the Fifth Circuit as regards Questions 1 and 2 presented herein, Juris. Stat., at 13-14, 19-20, but is also contrary to the law of the Eleventh Circuit, where only en banc reconsideration and overruling of *Castlewood International Corp.* v. *Simon*, 596 F.2d 638 (5the Cir. 1979), *vacated and remanded*, 446 U.S. 949, *reinstated*, 626 F.2d 1020 (5th Cir. 1980), and *Wine Industry of Florida, Inc.* v. *Miller*, 609 F.2d 1167 (5th Cir. 1980), would eliminate this inter-circuit conflict with respect to the Eleventh Circuit. *See Prichard* v. *Bonner*, 661 F.2d 1206, 1209 (11th Cir. 1981).

the important state interests at stake, trivializes the sovereign powers of all the States.

1. *Appellate jurisdiction.* The BATF advances the curious argument that this Court has no appellate jurisdiction over this case, asserting that "the court of appeals did not invalidate any Idaho law" and that the court of appeals simply held that "there is no conflict between the Idaho and federal laws." Motion, at 5. Those statements do not accurately reflect the *holding* of the Ninth Circuit that an express provision of the *Idaho Code*, § 23-1325A, is overridden by a BATF regulation which "should prevail over the less substantial state interest." J.S. App., at 6a, 779 F.2d, at 1411.[2]

The BATF's unusual interpretation of the word "invalidate" is not supported by any of the cases it cites and is refuted by any number of appeals recently decided or noted by this Court in which this Court has assumed appellate jurisdiction over similar cases under 28 U.S.C. § 1257(2)[3] even though the state court decision appealed from found *no* "conflict" between the pertinent state and federal laws. *See, e.g., Fisher* v. *City of Berkeley*, No. 84-1538, 106 S. Ct. 1045 (1986); *324 Liquor Corp.* v. *Duffy*, No. 84-2022, *prob.*

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[2] The BATF, Motion, at 3, attempts to characterize this square *holding* of the court below, which comes at the conclusion of part II of the court's opinion, as nothing more than an observation. That characterization of what is indisputably a holding of the court below is disingenuous.

[3] This Court has expressly recognized the relevance of its construction of 28 U.S.C. § 1257(2) in cases brought to it on appeal from state courts to interpretation of 28 U.S.C. § 1254(2) in cases brought on appeal from the federal courts of appeals. *See, e.g., Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 247 n.9 (1984).

juris. noted, March 24, 1986. Thus, it is clear that this Court must take jurisdiction of this case unless this Court deems the questions to be insubstantial.[4] The questions are, as previously demonstrated by appellant, undoubtedly substantial standing alone and are inescapably substantial in view of the conflict between the decision below and those of other courts of appeals on all three of the questions presented.

2. *The Twenty-first Amendment Question.* The BATF, relying on cases in which the challenged state regulations had a demonstrable and direct impact on interstate commerce and only an attenuated relationship to the intrastate distribution of alcoholic beverages, Motion, at 9-10,[5] argues in essence that Congress may authorize the BATF to regulate the purely intrastate aspects of a State's alcohol distribution system without any constraint by the Twenty-

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[4] The suggestion of the BATF, Motion, at 5 n.2, that a decision striking down a state statute and casting grave doubt on the statutes of at least six other States is suitable for summary affirmance in the context of a square inter-circuit conflict cannot be take seriously.

[5] The BATF's reliance on this Court's decision in *Bacchus Imports, Ltd.* v. *Dias*, No. 82-1565 (June 29, 1984), 104 S.Ct. 3049 (1984), illustrates this point. The state tax struck down in *Bacchus* was a direct burden on interstate commerce in alcoholic beverages which was not imposed by Hawaii on certain locally produced alcoholic beverages. The majority in Bacchus observed that "[t]he central purpose of the [Twenty-first Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition." 104 S. Ct., at 3058. There is no element of discrimination in this case and, as demonstrated by the dissenting opinion of Justice Stevens in *Bacchus, id.*, at 3062-64, this Court has stated on innumerable occasions that the States' power over the *distribution* of alcoholic beverages is the core principle enshrined by the Twenty-first Amendment.

first Amendment and without regard to, or respect for, contrary state law. The Fifth Circuit has twice squarely rejected this argument, and its decisions are also binding in the Eleventh Circuit, note 1, *supra*. The BATF regulation at issue is nothing less than an exercise of purported regulatory authority to impose uniform national standards on the intrastate distribution of alcohol, a goal not within Congress's power under the Government's own statements to this Court. Juris. Stat., at 18 & n.10. Furthermore, the burden of the BATF's argument is that state statutes enacting state policies dealing directly with the distribution of alcohol within a State stand on no different footing than a State's regulation of other economic activity not implicating the Twenty-first Amendment. That cannot be the law, nor do the cases relied upon by the BATF establish that to be the law.[6]

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[6] The BATF's assertion, Motion, at 10, that appellant's Twenty-first Amendment argument was either presented to, or decided by, *William Jameson & Co.* v. *Morgenthau*, 307 U.S. 171 (1939), rests on a mischaracterization of appellant's position. In *Morgenthau*, the appellant had sought to enjoin the execution of the FAAA on the grounds that Congress's power over the importation of alcoholic beverages into the United States had been repealed by the Twenty-first Amendment. *Id.*, at 172-73. Appellant's argument is at the other extreme on the vague continuum which exists between the States' exercise of exclusive power under the Twenty-first Amendment and Congress's power to regulate foreign and interstate commerce. Although this Court's cases are not fully illuminating as to where exclusive state power stops and preemptive federal power begins on that continuum, appellant's submission is that the decision below, if correct, leaves no room left for the States to exercise any exclusive authority over intrastate distribution of alcoholic beverages.

3. *The "Conflict" Question.* The BATF argues, Motion, at 5-8, that the contrary decisions of the Fifth Circuit on the "conflict" question are, as asserted by the court below, simply wrongly decided. The BATF's argument is typified by its heavy reliance, Motion, at 6, 7, 9, on this Court's decision in *Rice* v. *Norman Williams Co.*, 458 U.S. 654 (1982). That case involved a facial challenge to a California alcoholic beverage law as being preempted by § 1 of the Sherman Act pursuant to the Supremacy Clause. This Court refused to find that California law to be preempted, stating that such a state law "may be condemned under the antitrust laws only if it mandates *or authorizes* conduct that necessarily constitutes a violation of the antitrust laws in all cases." *Id.*, at 661 (emphasis added). This language from *Rice* recognizes that, as a general matter, state and federal law may be in "conflict" for Supremacy Clause purposes even if the state law does not *mandate* the private activity alleged to violate federal law.[7]

The BATF makes no response to appellant's argument that the "conflict" analysis of the Ninth Cir-

[7] As demonstrated in the text above, the BATF's argument that *Rice* is "controlling" as regards the presence of conflicting state and federal substantive rules, Motion, at 6, is in error. The BATF's reliance on the Court's decision in *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U.S. 35 (1966), as the other "controlling" case on this point, is equally to no avail. The BATF's contorted explanation of *Seagram* reflects a confusion between this Court's appropriate unwillingness to strike down a state statute on its face, as in *Seagram*, and the question whether a significant state policy related to the *intrastate* distribution of alcoholic beverages may be nullified on the pretense that, because not mandatory, the state policy does not implicate either the Twenty-first Amendment or broader federalism concerns.

cuit, if sustained, would virtually repeal the Twenty-first Amendment's reservation to the States of the primary, and perhaps exclusive, power to regulate the distribution of alcoholic beverages within their respective borders. This must be because there is no plausible response. As the Attorney General of Idaho has made clear to this Court, Idaho's comprehensive scheme for regulating the distribution and sale of alcoholic beverages is made up of a blend of prohibitory and permissive measures based upon well considered judgments of the Idaho legislature regarding this particular economic and social activity. *See* Br. of the Attorney General for the State of Idaho as *Amicus Curiae* in Support of Jurisdiction, at 3-5, 11-12.

Indeed, as the Attorney General of Idaho points out, Br., at 9, all Idaho's legislature has done is to decide that the servicing by distributors of wine displays in grocery stores in Idaho produces the same benefits to the citizenry of Idaho as the identical and completely legal servicing by distributors of beer and virtually all other food products in those grocery stores. If Idaho may not make this policy judgment free from the interference of the BATF, it is difficult to comprehend what a "core power" under the Twenty-first Amendment might be. As importantly, it blinks reality to suggest, as does the BATF, Motion, at 7, that the regulation at issue, 27 C.F.R. § 6.99, does not frustrate the "purposes and objectives" of Idaho. *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). The purposes and objectives enacted in Idaho's comprehensive alcohol control laws generally, and embodied specifically in § 23-1325A of the Idaho Code, could not be clearer.[8] The nullification

[8] The BATF's unwillingness to recognize the "purposes and

of these policies by the decision below is equally clear.[9]

4. *The Statutory Authority Question.* The BATF, purporting to rely on the "plain language" of the tied-house provision of the FAAA, 27 U.S.C. § 205(b)(3)—"other thing of value"—reads into that language an intent by Congress to authorize the BATF to prohibit the resetting by a distributor of all wine on the shelves of a retailer. The BATF attempted, unsuccessfully, to convince the D.C. Circuit that those same words could also be construed to encompass below-cost sales. *National Distributing Co.* v. *U.S. Treasury Department*, 626 F.2d 997 (D.C. Cir. 1980). The "plain language" of § 205(b)(3) mentions neither wine resetting nor below-cost pricing.

The issue in *National Distributing*, 626 F.2d, at 1004, was whether the words "other thing of value"

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objectives" of Idaho law is exemplified by the absence in the Motion to Dismiss of so much as a citation to § 23-1325A, the Idaho statute necessarily struck down by the court below.

[9] In this Court, the BATF embraces the position of the Ninth Circuit that it would be "incongruous" to hold that § 23-1325A was "intended to shield wholesalers" from the requirements of federal law, Motion, at 4, or that § 23-1325A should be read to express a legislative intent "to insulate" appellant's conduct from challenge under federal law, Motion, at 7. This attempt to rewrite the state statute, however, is both inappropriate and comes too late. The BATF itself determined below that Idaho's law "was specifically amended in 1974 to permit the challenged activities . . . ." J.S. App., at 25a. As pointed out by the State of Idaho in this Court, the clarification of Idaho law in 1984 by the enactment of § 23-1325A was accomplished by the Idaho legislature in the context of the specific enforcement action at issue here. Br. of the Attorney General for the State of Idaho as *Amicus Curiae* in Support of Jurisdiction, at 5.

were to be given the broad construction urged by the BATF or were, instead, to be construed more narrowly to apply only to conduct which related to "tieing sales, quota sales, exclusive outlets, or the like." *Id.*, at 1004 n.28. The D.C. Circuit adopted a narrow construction of the words "other thing of value" after an extensive review of the legislative history of the tied-house provision, *id.*, at 1008-10, from which it concluded that the "'tied-house evils'—political corruption, proliferation of saloons, increase in alcohol consumption, and irresponsible ownership of retail outlets—were unrelated to price competition." Here, the BATF has not pointed to so much as a single line in the legislative history of the words "other thing of value" which would bring this case out from under the analysis and holding of *National Distributing*.

On its facts and analysis, *National Distributing* cannot be distinguished from the case at bar. It is understandable that the BATF impugns the "merits of that decision," Motion, at 11, but the BATF had the opportunity to seek review in this Court of that thorough, detailed judicial exposition of the history and meaning of the tied-house provision of the FAAA and chose not to do so. This Court should settle, once and for all, whether the long shadow cast by *National Distributing* over the regulatory activities of the BATF under the tied-house provision is justified so that Congress's will, to the extent it may constitutionally be implemented, can be implemented uniformly throughout the several States.

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